05-7142

ORIGINAL

No. 05 - ____

IN THE

Supreme Court of the United States

Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

Timothy Williams,

Petitioner,

v.

William Overton et al.,

Respondents.

John H. Walton,

Petitioner,

v.

Barbara Bouchard et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 17, 2005

QUESTION PRESENTED

42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. 104-134, 110 Stat. 1321 (1996), provides that "[n]o action shall be brought with respect to prison conditions" under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." "[E]xhaustion in cases covered by § 1997e(a) is * * * mandatory." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The questions presented, over which the circuits are intractably split, are:

1. Whether the PLRA requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them.

2. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

PARTIES TO THE PROCEEDINGS BELOW

Williams. William Overton (named in the caption), David Jamrog, Mary Jo Pass, Paul Klee, Chad Markwell, and Bonnie Peterson were defendants below and are respondents here. George Pramstaller was named as a defendant in the district court but never served with a summons or a copy of Williams' complaint and is not a respondent here.[1]

Walton. Barbara Bouchard (named in the caption), Ken Gearin, David L. Bergh, Catherine S. Bauman, and Denise Gerth were defendants below and are respondents here.

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[1] Recognizing that Pramstaller was not served due to the United States Marshal's lack of diligence, the magistrate noted that, if her report and recommendation were to be rejected – which would include it being rejected after appeal – she would order the Marshal to again attempt service on Pramstaller. *See* Pet. App. 36a n.10.

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PETITION FOR WRIT OF CERTIORARI

Timothy Williams and John H. Walton respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit.[2]

OPINIONS BELOW

Williams. The opinion of the United States Court of Appeals for the Sixth Circuit in the *Williams* case (Pet. App. 1a-7a) is not reported in the Federal Reporter but is *available at* 136 Fed. Appx. 859. The order of the district court (Pet. App. 8a-9a) and the report and recommendation of the magistrate judge (Pet. App. 10a-37a) are unreported.

Walton. The opinion of the United States Court of Appeals for the Sixth Circuit in the *Walton* case (Pet. App. 38a-43a) is not reported in the Federal Reporter but is *available at* 136 Fed. Appx. 846. The order of the district court (Pet. App. 44a-45a) and the report and recommendation of the magistrate judge (Pet. App. 46a-51a) are unreported.

JURISDICTION

Williams. The judgment of the court of appeals in the *Williams* case was entered on June 22, 2005. Justice Stevens extended the time for Williams to file his petition to and including October 20, 2005. App. No. 05A243. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[2] Petitioners file this petition jointly pursuant to Supreme Court Rule 12.4. *See* Sup. Ct. R. 12.4 ("When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices."); *see also* Robert L. Stern et al., Supreme Court Practice 392, 399-400 (8th ed. 2002).

Walton. The judgment of the court of appeals in the *Walton* case was entered on June 17, 2005. Justice Stevens extended the time for Walton to file this petition to and including October 17, 2005. App. No. 05A209. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

Section 1997e(a) of the Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996), provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT

The two Sixth Circuit decisions challenged in this petition raise important and recurring issues – over both of which the federal courts of appeals are increasingly and intractably divided – regarding how federal courts should apply the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), at the pleading stage.

Prior to 1996, the requirement that a prisoner exhaust administrative remedies before commencing an action under 42 U.S.C. § 1983, was "in large part discretionary." *Porter v. Nussle*, 534 U.S. 516, 523 (2002). The then-governing statute authorized a district court, if it "believe[d] that such a requirement would be appropriate and in the interests of justice," to stay the prisoner's action for a period not to exceed 180 days while the prisoner exhausted administrative remedies. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 352 (1980), *as amended*, 42 U.S.C. § 1997e (1994). This Court described this provision as a "limited exhaustion requirement." *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992).

In the PLRA, Congress amended the exhaustion prescription. Section U.S.C. § 1997e(a) now provides that "[n]o action shall be brought with respect to prison conditions"[3] under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Thus, "exhaustion in cases covered by § 1997e(a) is now mandatory." *Porter*, 534 U.S. at 524.

This Court has twice before addressed the contours of PLRA exhaustion, first in *Booth v. Churner*, 532 U.S. 731 (2001), and then in *Porter*. In *Booth*, the Court held that prisoners must satisfy the PLRA's exhaustion requirement even if a state's prison grievance process will not award them the relief they ultimately seek (*e.g.*, money damages), *see* 532 U.S. at 741, and in *Porter*, the Court held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." 534 U.S. at 532. Nonetheless, as one of the leading PLRA scholars noted recently, "the Supreme Court's work is not done." Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L. REV. 1771, 1773 (2003). Left unaddressed by *Booth* and *Porter* are the two important and recurring questions, over which the circuits are avowedly divided, presented in this petition.

In both decisions challenged by this petition, the Sixth Circuit first applied its prior opinions in *Burton v. Jones*, 321 F.3d 569 (CA6 2003), and *Curry v. Scott*, 249 F.3d 492 (CA6 2001), which engrafted onto § 1997e(a) a requirement that, for a PLRA plaintiff to preserve the

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[3] "Prison conditions" suits comprise "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532.

right to sue a particular defendant, the defendant must be named in the PLRA plaintiff's administrative grievance. *See Burton*, 321 F.3d at 575 ("[F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at [the initial stage] of the grievance process."); *Curry*, 249 F.3d at 505 (requiring "that a prisoner file a grievance against the person he ultimately seeks to sue"); *see also Thomas v. Woolum*, 337 F.3d 720, 735 (CA6 2003) (stating reluctantly that the court was "bound by our decision in *Curry* * * * which * * * requires prisoners to file grievances 'against' specific defendants"). Having applied this requirement to petitioners' complaints and having found that petitioners failed to name certain defendants in their underlying administrative grievances, the Sixth Circuit found that petitioners failed to exhaust their administrative remedies as to those defendants and affirmed their dismissal from petitioners' suits.

Next, the Sixth Circuit applied to petitioners' *exhausted* claims its prior decision in *Jones Bey v. Johnson*, 407 F.3d 801 (CA6 2005), which requires a district court to dismiss the entirety of a mixed complaint – *i.e.*, one that alleges both exhausted and unexhausted claims – despite the presence of exhausted claims. *See id.* at 805 ("[T]he PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies."); *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA."). As we show in detail *infra*, *Burton*, *Curry*, *Thomas*, and *Jones Bey*, and, therefore, the two decisions below, are inconsistent with the decisions of numerous other circuits. In particular, *Burton*, *Curry*, and *Thomas*, are inconsistent with the decisions of six other circuits, whereas *Jones Bey* is consistent with the decisions of two other circuits but inconsistent with the decisions of four others.

In 2004 nationwide, prisoners brought 23,449 prison-condition and civil rights suits against state and federal correctional officials.[4] Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004, tbl. 2.2 (2005), http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf. These filings comprised over 8% of the civil cases filed, outnumbering every other category of civil filings, including habeas filings, *compare id. with id.* tbl. 2.1, and over 6.5% of all cases filed (civil and criminal) in the nation's district courts in 2004, *compare id.* tbl. 2.2 *with id.* tbl. 4.1.

Although we know of no statistics indicating the number of PLRA suits involving the questions presented here, the numbers are clearly immense. These issues affect every PLRA plaintiff who brings properly exhausted claims, yet unwittingly – and likely due to their *pro se* status, lack of legal training, and lack of access to the most current legal materials – names as a defendant a prison official not named in the prisoner's administrative grievance or adds unexhausted claims to his or her complaint. Thus, each Term that this Court waits to resolve the issues presented in this petition, hundreds – if not, thousands – of PLRA plaintiffs bringing properly exhausted prison condition claims will lose their opportunity to test the merits of their claims in federal court. Because of these staggering numbers, this Court's prompt articulation of national PLRA exhaustion standards is required.

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[4] Historical caseload profiles are *available at* http://www.uscourts.gov and in John Scalia, U.S. Dep't of Justice, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (rev'd ed. 2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf.

A. Factual and Procedural Background: *Williams*[5]

On January 7, 2003, Williams, an inmate in the custody of the Michigan Department of Corrections (MDOC), filed a *pro se* 42 U.S.C. § 1983 federal civil rights suit against respondents. *See* Pet. App. 1a. Williams' complaint brought two sets of claims: one alleging that he was improperly denied a surgical procedure and related post-operative therapy to remove tumors from his right arm and hand [hereinafter, the "denial of surgery claim"] and the other alleging that he was wrongfully denied a single-occupancy cell to accommodate his impairment [hereinafter, the "single-occupancy cell accommodation claim"]. *See id.* 3a, 11a. These claims alleged violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Eighth and Fourteenth Amendments. *See id.* 4a, 12a.

In lieu of filing an answer, on April 15, 2003, respondents moved to dismiss, or alternatively for summary judgment on, the entirety of Williams' complaint. *See id.* 4a. On July 22, 2003, the magistrate to whom the case was referred issued a report and recommendation which recommended that respondents' motion be granted. *See id.* 10a-38a.

Relevant to this petition, the magistrate recommended that respondents' motion to dismiss should be granted as to Williams' denial of surgery claim because he failed to name any of the respondents specifically in the grievance[6] underlying this claim, and therefore, had failed

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[5] The facts as stated in this petition are taken from the decisions below, which in turn were taken from the allegations in petitioners' complaints, all of which are assumed true on appeal from a motion to dismiss. *See Swierkiewicz v. Sorema, N. A.*, 534 U.S. 506, 508 n.1 (2002).

[6] A Michigan prisoner's administrative remedies are set forth at Michigan Department of Corrections Policy Directive ("MDOC PD") No. 03.02.130 (October 11, 1999), *attached as* Pet.

(continued...)

to exhaust his administrative remedies.[7] *See id.* Having already recommended that Williams' denial of surgery claim be dismissed for failure to exhaust, the magistrate applied the "total exhaustion" rule to Williams' single-occupancy cell accommodation claim[8] and recommended that Williams' entire complaint be dismissed. *See id.* 26a-32a.

Over Williams' objections, on October 31, 2003, the district court accepted and adopted the magistrate's recommendations "with regards to the failure to exhaust administrative remedies

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[6](...continued)
App. 52a-58a, which provides for a three-level written grievance procedure to be used after a prisoner attempts to verbally resolve an issue. At Step I, the prisoner files a written grievance with the Step I grievance coordinator, who assigns someone to respond. *See* MDOC PD No. 03.02.130(T), Pet. App. 55a. If the prisoner does not receive a timely response or is dissatisfied with the response at Step I, the prisoner may file a Step II appeal with the Step II grievance coordinator. *See id.* Likewise, if the prisoner does not receive a timely Step II response or is dissatisfied with the response, the inmate may file a Step III appeal with MDOC's Prisoner Affairs Section. *See id.* There is no dispute that Williams carried his grievances through all three Steps.

[7] With respect to Williams' denial of surgery claim, the magistrate also recommended that summary judgment be granted to respondents because (1) Williams failed to present sufficient evidence that any respondent "was personally involved with the decision to deny the surgery request" or, in the absence of personal involvement, that any respondent was liable under a theory of supervisory liability, Pet. App. 20a-21a, and (2) respondents were qualifiedly immune from suit, *see id.* 23a-25a. These recommendations are not germane to this petition because the district court expressly declined to address them, and therefore, they were not before the court of appeals. *See id.* 8a.

[8] The magistrate also recommended that summary judgment be granted to respondents on Williams' single-occupancy cell accommodation claim because (1) with respect to Williams' claims of discrimination in violation of the ADA, the Rehabilitation Act, and the Equal Protection Clause of the Fourteenth Amendment, Williams failed to offer sufficient evidence of bias against him, *see* Pet. App. 33a-34a; (2) with respect to Williams' claim of cruel and unusual punishment in violation of the Eighth Amendment, Williams failed to offer sufficient evidence that he would be significantly safer in a single cell, *see id.* 34a-35a; and (3) respondents were qualifiedly immune from suit on this claim, *see id.* 35a. These recommendations are not germane to this petition because the district court expressly declined to address them, and therefore, they were not before the court of appeals. *See id.* 8a.

issue" and dismissed Williams' complaint.[9] *Id.* 8a-9a.

On June 22, 2005, the Sixth Circuit affirmed the judgment of the district court with analysis that tracked the magistrate's report and recommendation. *See id.* 1a-7a. Relying on its prior decisions in *Curry*, *Burton*, and *Thomas*, *see* Pet. App. 5a, 6a, the Sixth Circuit affirmed the dismissal of Williams' denial of surgery claim because his "grievance failed to specifically name any of the appellees that Williams has named in his complaint," *id.* 6a. Having affirmed the dismissal of Williams' denial of surgery claim, the Sixth Circuit applied *Jones Bey*'s "total exhaustion" rule[10] to affirm the dismissal of Williams' single-occupancy cell accommodation claim "despite the fact that he appears to have exhausted his administrative remedies" with respect to this claim. Pet. App. 5a, 6a.

This petition followed.

B. Factual and Procedural Background: *Walton*

On August 12, 2002, Walton, another inmate in the custody of the MDOC, filed a *pro se* § 1983 federal civil rights suit against respondents. Walton alleged that prison officials

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[9] The district court explicitly declined to address the magistrate's analysis of the merits of Williams' claims – presumably because, upon adoption of the magistrate's recommendations on the exhaustion issues, an analysis of the merits of Williams' claims would be moot. *See id.* 4a, 8a.

[10] At the time the magistrates and district courts applied the "total exhaustion" rule to Williams' and Walton's complaints, the rule had not yet been endorsed by the Sixth Circuit. *See Knuckles-El v. Toombs*, 215 F.3d 640, 642 (CA6), *cert. denied*, 531 U.S. 1040 (2000) ("We reserve to another day the question of whether exhausted claims in a 'mixed' complaint should be dismissed * * * or whether such a complaint should be dismissed in its entirety."). By the time the Sixth Circuit considered Williams' and Walton's appeals, however, *Jones Bey* had adopted the "total exhaustion" rule as law of the circuit. *See* 407 F.3d at 805 ("[T]he PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies."); *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA.").

discriminated him against based on his race when he was given an indefinite upper slot restriction after assaulting a correctional officer. *See* Pet. App. 46a. Walton, who is black, alleged that white prisoners who assaulted officers received an upper slot restriction for only a limited time period. *See id.*

In lieu of filing an answer, on January 13, 2003, respondents moved to dismiss the entirety of Walton's complaint. *See id.* 46a. On July 28, 2003, the magistrate to whom the case was referred issued a report and recommendation which recommended that respondents' motion be granted. *See id.* 46a-51a.

The magistrate found that Walton exhausted his administrative remedies against only one of the named defendants because he "failed to mention the other named defendants in his grievances, even after the Step I response informed plaintiff that [another] defendant * * * was responsible for giving him the restriction."[11] *Id.* 47a. Having found that Walton failed to exhaust his administrative remedies against the remaining defendants, the magistrate, like the magistrate in petitioner Williams' case, recommended that the entirety of Walton's complaint be dismissed under the "total exhaustion" rule. *See id.* 47a-50a. Over Walton's objections, on October 14, 2003, the district court adopted the magistrate's report and recommendation in full and dismissed Walton's complaint. *See id.* 44a-45a.

On June 17, 2002, the Sixth Circuit affirmed the judgment of the district court with analysis that tracked the magistrate's report and recommendation and is indistinguishable from its analysis in petitioner Williams' case. *See id.* 38a-43a. Relying on its prior decisions in *Curry*

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[11] For a description of the MDOC's grievance procedures, *see supra* note 5. As in petitioner Williams' case, there is no dispute that Walton carried his grievances through all three Steps of the MDOC's grievance system.

and *Burton*, the Sixth Circuit held that Walton "named only [one defendant] in Step I of his grievance process, and under our precedent that is the only claim that we may consider exhausted." *Id.* 42a. Having thus found that Walton's claims against the remaining defendants were unexhausted, the Sixth Circuit applied *Jones Bey*'s "total exhaustion" rule to affirm the dismissal of Walton's entire complaint. *See id.* ("His claims as to all other defendants remain unexhausted and accordingly the district court properly dismissed the entire complaint under *Jones Bey*'s total exhaustion requirement.").

This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve recurring circuit conflict over the application of the PLRA's exhaustion requirement.

A. The Federal Courts of Appeals Are Irreconcilably Split over Whether the PLRA Requires a Prisoner to Name a Particular Defendant in His or Her Administrative Grievance in Order to Exhaust His or Her Administrative Remedies as to That Defendant and to Preserve the Right to Sue Them

There can be no doubt that the federal courts of appeals are deeply and avowedly split on the first question presented by this petition and that this circuit split merits resolution. The eight federal courts of appeals that have confronted the issue fall into three distinct camps, ranging from "yes" through several variations of "not necessarily" to "no." These disagreements have resulted in at least a 2-3-2 split (and possibly a 2-3-3 split) that requires this Court's intervention.

Two courts of appeals – the Sixth and Eighth Circuits – have held that to administratively exhaust a claim against a particular defendant, the prisoner must have named that defendant in his or her prison grievance. As shown *supra*, the Sixth Circuit has held that all defendants that a prisoner wishes to sue must be named in the prisoner's administrative grievance. *See Burton*,

321 F.3d at 575 ("[F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at [the initial stage] of the grievance process."); *Curry*, 249 F.3d at 505 (requiring "that a prisoner file a grievance against the person he ultimately seeks to sue"); *see also Thomas v. Woolum*, 337 F.3d 720, 735 (CA6 2003) (stating reluctantly that the court was "bound by our decision in *Curry* * * * which * * * requires prisoners to file grievances 'against' specific defendants"). Similarly, but more narrowly, the Eighth Circuit has held without much discussion that a prisoner who filed a grievance alleging that officers abused him, but did not raise their supervisor's failure to supervise and to take action against the officers or the supervisor's retaliation against the prisoner for complaining, had not exhausted his remedies as to his supervisory claims. *See Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (CA8 2003).

Three circuits – the Third, Fifth, and Eleventh Circuits – fall in the "not necessarily" camp. In *Spruill v. Gillis*, 372 F.3d 218 (CA3 2004), the Third Circuit held that the prisoner's failure to name a particular defendant was a procedural default since the grievance policy required it but that the default was excused because the grievance process itself identified the staff member involved. *See id.* at 234. In particular, the court noted that the accusation against that defendant did not involve specific incidents of conduct but, rather, of his involvement in a larger-scale denial of adequate medical care. *See id.* Because, in the Third Circuit's view, "[t]he purpose of the [prison grievance system] is to put the prison officials on notice of the persons claimed to be guilty of wrongdoing * * * * the prison can excuse an inmate's failure to do so by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance." *Id.*; *cf. also Freeman v. Inch*, No. 3:04-CV-1546, 2005 WL 1154407, *5 (M.D. Pa., May 16, 2005) (noting that federal prison grievance system required

plaintiff only "to provide a brief statement of his complaint and to state his reason for appealing the previous rejection"), *reconsideration denied*, 2005 WL 1322734 (M.D.Pa., June 2, 2005).

Similarly, the Fifth Circuit has said that exhaustion requires "'fair notice' of the problem that will form the basis of the prisoner's suit." *Johnson v. Johnson* 385 F.3d 503, 516 (CA5 2004). It stated that "the amount of information necessary will likely depend to some degree on the type of problem about which the inmate is complaining"– *e.g.*, a claim of staff misconduct might require more details concerning who was involved and when it occurred, while a claim that a cell is habitually infested with vermin or commissary prices were too high might not require naming anyone. *Id.* at 517; *see also Warner v. Gonzales*, No. 7:03-CV-174-AH, 2004 WL 2331615, *2-*3 (N.D. Tex., Oct. 13, 2004) (applying *Johnson*). According to the Fifth Circuit, correctional staff members can be identified by name *or* functional descriptions. *See id.* at 523 (holding identification of Unit Classification Committees was sufficient to exhaust as to their members); *see also Gibson v. Shabaaz*, No. Civ.A. H-04-3405, 2005 WL 1515396, *7 (S.D. Tex., June 23, 2005) (holding reference to nurse and optometrist were sufficient to exhaust; defendants could have reviewed plaintiff's medical records and learned their identities). Like the Third Circuit, the Fifth Circuit reasoned that the purposes of the exhaustion requirement "include the goal of giving officials 'time and opportunity to address complaints internally.' Thus, a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Johnson*, 385 F.3d at 516-17 (quoting *Porter*, 534 U.S. at 525).

Likewise, the Eleventh Circuit rejected the view that § 1997e(a) "*always* prohibits a prisoner from suing any defendant other than those named in the administrative grievance," holding that it only "requires that a prisoner provide as much relevant information as he

reasonably can in the administrative grievance process" – including the names of perpetrators and witnesses that the prisoner knows.[12] *Brown v. Sikes*, 212 F.3d 1205, 1207-08 (CA11 2000) (emphasis added).

Two circuits – the Seventh and the Ninth Circuits – (and possibly a third – the Second Circuit)[13] – have rejected the view that, to administratively exhaust a claim against a particular defendant, the prisoner must have named that defendant in his or her prison grievance. In *Riccardo v. Rausch*, 375 F.3d 521 (CA7 2004), *cert. denied*, 125 S. Ct. 1589 (2005),[14] the

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[12] The Eleventh Circuit has recognized "seven important policies favoring exhaustion of remedies:"

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

Brown, 212 F.3d at 1208 (quoting *Alexander v. Hawk*, 159 F.3d 1321, 1327 (CA11 1998)). In *Brown*, the Eleventh Circuit held that "[n]one of those purposes is furthered by requiring a prisoner to do anything more than" "provide with his grievance all relevant information reasonably available to him." *Id.*

[13] The Second Circuit has implicitly answered "no" by adopting the Seventh Circuit's position in *Strong v. David*, 297 F.3d 646 (CA7 2002). *See Johnson v. Testman*, 380 F.3d 691, 697 (CA2 2004) ("[T]he grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." (quoting *Strong*, 297 F.3d at 650)); *see also Turner v. Goord*, 376 F. Supp. 2d 321, 324 (2005) ("The Second Circuit appears to have adopted the approach taken by the Seventh Circuit in *Strong*.").

[14] Because the plaintiff prevailed on the "name the defendants" issue, he did not raise it as an issue in his petition for certiorari. *See* Petition for Certiorari, *Riccardo v. Rausch*, No. 04-510, at i. Accordingly, to our knowledge, this issue has not yet been before this Court. *See* Sup.

(continued...)

Seventh Circuit rejected a "name the defendants" rule, while emphasizing that the grievance policy did not require a particular degree of specificity in grievances. *See id.* at 524; *accord Barnes v. Briley*, 420 F.3d 673, 678-79 (CA7 2005). Moreover, in *Dye v. Kingston*, 130 Fed. Appx. 52 (CA7 2005), the Seventh Circuit confirmed that it does not require exhaustion by defendant. *See id.* at 55 ("We and the majority of circuits have never endorsed * * * the defendants' invitation to engraft onto § 1997e(a) a requirement that defendants to a civil suit be first named in an inmate's prison grievance." (comparing *Strong*, 297 F.3d at 649, *Johnson*, 385 F.3d at 522, *Testman*, 380 F.3d at 697, *and Brown*, 212 F.3d at 1207-08, *with Curry*, 249 F.3d at 505)). Likewise, the Ninth Circuit has held that a prisoner was not required to identify the defendants in a grievance where the grievance policy instructed prisoners only to "describe the problem" and did not require identification of individuals. *See Butler v. Adams*, 397 F.3d 1181, 1184 (CA9 2005).[15]

This case is a particularly good vehicle to resolve this inter-circuit conflict because, in any of the circuits other than the Sixth and Eighth Circuits, petitioners would have been found to have exhausted claims against at least one additional respondent in their respective cases. First, the MDOC Policy Directive governing grievances does not require a prisoner to name the correctional employees about whom he or she is grieving. *See* MDOC PD No. 03.02.130(U), Pet. App. 55a (stating only that "[t]he information provided shall be limited to the issue being grieved, and shall be as specific as possible"). Thus, under the law of the Seventh and Ninth

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[14](...continued)
Ct. R. 14(1)(a) ("[O]nly the questions set out in the petition * * * will be considered by the Court.").

[15] The Ninth Circuit did not say whether it would reach the opposite result if the grievance policy did require identifying defendants.

Circuits (possibly the Second Circuit too), petitioners would not have been required to name all of the individuals that they sued in their grievances.

Moreover, as the courts below found in each of petitioners' cases, the grievance processes identified individuals not named at Step I of petitioners' grievances as being potentially responsible for the conduct that petitioners grieved. *See* Pet. App. 19a (noting that, in petitioner Williams' case, defendant Pramstaller "'was identified [by Williams] in the Step III part of the grievance'" because Williams learned of Pramstaller's potential responsibility for Williams' denial of surgery claim only after Williams had initiated the grievance process); *id.* 39a (noting that, in petitioner Walton's case, the prison "responded to his grievance by stating that ADW Gearin had placed Walton on an indefinite upper slot restriction"). Accordingly, had petitioners cases been adjudicated in the Third, Fifth, or Eleventh Circuits, petitioners would have been found to have exhausted at least their claims against the individuals identified through the grievance process itself.

This Court's intervention is required to ensure uniformity in how the federal courts administer the PLRA's exhaustion requirement and to ensure that a PLRA plaintiff in one circuit is not deprived the of the opportunity to test the merits of his or her case solely because of the location of the prison in which he or she is incarcerated.

B. The Federal Courts of Appeals Are Intractably and Increasingly Split Over Whether the PLRA Prescribes a "Total Exhaustion" Rule that Requires Federal Courts to Dismiss a PLRA Plaintiff's Complaint for Failure to Exhaust Administrative Remedies Whenever There Is a Single Unexhausted Claim, Despite the Presence of Other Exhausted Claims

This petition also provides the Court an opportunity to resolve whether the PLRA prescribes a "total exhaustion" rule that requires federal courts to dismiss a PLRA plaintiff's complaint for failure to exhaust administrative remedies whenever there is a single unexhausted

claim, despite the presence of other exhausted claims – another issue over which the federal courts of appeals are intractably and increasingly divided.[16] The seven federal courts of appeals that have confronted mixed complaints – containing both exhausted and unexhausted claims – have responded in three ways, creating a 3-1-3 split that requires this Court's guidance.

Three courts of appeals have adopted a strict total exhaustion requirement. Another has adopted a total exhaustion requirement but allows PLRA plaintiffs to amend their complaints to remove unexhausted claims. Finally, three more practice "partial exhaustion" by dismissing only those claims that are unexhausted. The district courts in circuits which have not yet taken a position are similarly divided. This confusion throughout the federal judiciary, as the State of Michigan itself conceded just last Term, requires this Court's intervention. *See* Brief of the

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[16] This question is the same as the second question presented in *Jones v. Bock*, 135 Fed. Appx. 837 (CA6 2005), *pet. for cert. filed* (Oct. 13, 2005) (No. 05-____) (not docketed by the time this petition was filed). Should this Court grant the *Jones* petition – which it should – it should also grant this petition and consolidate the two cases.

In *Jones*, the Sixth Circuit applied the "total exhaustion" rule as an alternative justification for affirming the district court's dismissal of Jones' complaint. *See Jones*, 135 Fed. Appx. at 839. The primary holding of the Sixth Circuit – challenged in the first question presented in the *Jones* petition – was that dismissal of Jones' entire complaint was proper because he failed to comply with the Sixth Circuit's heightened pleading standards for PLRA plaintiffs. *See id.* Accordingly, if the Court were to grant the *Jones* petition and affirm the judgment of the Sixth Circuit on the first question presented, the Court would not need to reach the "total exhaustion" issue. *Cf.* Petition for Certiorari, *Jones v. Bock*, No. 05-____, at 15 (noting that "the 'total exhaustion' rule applied by the Sixth Circuit was only a viable alternative justification for affirming the district court because the Sixth Circuit applied it in conjunction with its heightened pleading standards"); *id.* at 23 (noting that, had the case been "decided in a circuit without a heightened pleading requirement *and* without a total exhaustion rule, petitioner's three exhausted claims would go forward" (emphasis added)). Unlike *Jones*, application of the "total exhaustion" rule was necessary to the Sixth Circuit's disposition of the two cases challenged in this petition.

Accordingly, to ensure that this Court has an opportunity to resolve the circuit split over the "total exhaustion" issue, the Court should grant both the *Jones* petition and this petition and consolidate the two cases.

States of California et al. as *Amici Curiae*, *McBride v. Ortiz*, No. 04-668 [hereinafter *Ortiz Amici* Br.], at 3-6.

Three courts of appeals – the Third, Sixth, and Tenth Circuits– have adopted a strict total exhaustion requirement by dismissing the entirety of a PLRA plaintiff's complaint if it contains even one unexhausted claim or party. As already outlined *supra*, the "total exhaustion" rule applied by the Sixth Circuit in this case "applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies." *Jones Bey*, 407 F.3d at 805; *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA."). In reaching this conclusion, the Sixth Circuit agreed with the Tenth Circuit's decision in *Ross*, *see id.* at 806, 807, which held that "the presence of unexhausted claims in [a PLRA plaintiff's] complaint required the district court to dismiss his action in its entirety," *Ross*, 365 F.3d at 1189. The Third Circuit recently reached the same conclusion. *See Vazquez v. Ragonese*, No. 05-1203, 2005 WL 1842273, *1 (CA3 Aug. 4, 2005) (affirming district court's dismissal of prisoner's civil rights complaint where prisoner "exhausted his administrative remedies only with respect to his allegations of retaliation * * * [but] failed to exhaust his available administrative remedies with respect to all other claims"); *see also Rivera v. Whitman*, 161 F. Supp. 2d 337, 343 (D.N.J. 2001) (embracing total exhaustion rule); *but see also Boyd v. Pugh*, No. Civ. 3:CV-04-1761, 2005 WL 1430087, *3 n.1 (M.D. Pa. June 17, 2005) (rejecting total exhaustion rule).

The Third Circuit's position on the issue is devoid of reasoning, *see Vazquez*, 2005 WL 1842273, at *1, but the Sixth and Tenth Circuits have reasoned that both the PLRA's text and various policy considerations mandate their total exhaustion rule. According to these courts, because the exhaustion provision states that no "action" shall be brought in federal court until

administrative remedies have been exhausted, 42 U.S.C. § 1997e(a), but the subsection prescribing rules for dismissal refers to "actions" or "claims," *id.* § 1997e(c)(1) & (2),[17] Congress intended that prisoners exhaust administrative remedies on all claims before commencing an action. *See Jones Bey*, 407 F.3d at 807; *see also Ross*, 365 F.3d at 1190. These courts also reasoned that a total exhaustion rule furthers Congress' stated policy behind the PLRA of "reduc[ing] the sheer number of prisoner suits, especially frivolous ones." *Jones Bey*, 407 F.3d at 807; *see also Ross*, 365 F.3d at 1190. Finally, these courts analogized their total exhaustion rules to the total exhaustion rule adopted by this Court in the habeas context and reasoned that the comity concerns present in the habeas context are equally present in the prison conditions context. *See Jones Bey*, 407 F.3d at 807-08 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)); *see also Ross*, 365 F.3d at 1189-90.

In contrast, the Eight Circuit has applied the total exhaustion rule but has done so with flexibility that prevents undue prejudice to prisoners. In *Graves v. Norris*, 218 F.3d 884 (CA8 2000), a short *per curiam* opinion, the Eighth Circuit held that "[w]hen multiple prison condition

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[17] Section 1997e(c) provides:

> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C. § 1997e(c).

claims have been joined * * * § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Id.* at 885. Subsequently, however, the Eight Circuit modified its total exhaustion rule in *Kozohorsky*. There, the court held that district courts within the Eighth Circuit must allow PLRA plaintiffs to cure defects in their complaints that run afoul of the total exhaustion rule by amending their complaints to delete any unexhausted claims. *See Kozohorsky*, 332 F.3d at 1144 (holding that "the District Court abused its discretion" by denying the plaintiff's "request to amend his complaint * * * dismiss [the unexhausted defendant and] cure[] the defect necessitating dismissal"). Like the Sixth and Tenth Circuits, *see Jones Bey*, 407 F.3d at 807-08; *see also Ross*, 365 F.3d at 1189-90, the Eighth Circuit looked to this Court's habeas jurisprudence regarding mixed habeas petitions but, unlike the Sixth and Tenth Circuits, concluded that this Court's habeas jurisprudence supports a rule allowing PLRA plaintiffs to amend their complaints to remove unexhausted claims, *see Kozohorsky*, 332 F.3d at 1144 (discussing *Rose v. Lundy*, 455 U.S. 509, 510, 512 (1982)).

Yet three other courts – the Second, Fifth, and Seventh Circuits – have either expressly adopted, or implicitly adopted through practice, a partial exhaustion rule, under which unexhausted claims shall be dismissed and exhausted claims shall go forward. In *Ortiz v. McBride*, 380 F.3d 649 (CA2 2004), *cert. denied*, 125 S. Ct. 1398 (2005),[18] the Second Circuit

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[18] Although the second question presented in this petition was squarely presented and debated extensively by the parties and *amici* at the certiorari stage in *Ortiz*, this case is a preferable vehicle for deciding the issue. *Compare* Petition for Certiorari, *McBride v. Ortiz*, No. 04-668, at 6-18, *and Ortiz Amici* Br. at 3-9, *with* Brief for the Respondent in Opposition, *McBride v. Ortiz*, No. 04-668 [hereinafter *Ortiz* BIO], at 4-16. First, since this Court denied certiorari in *Ortiz*, two additional circuits – the Third and the Sixth Circuits – have taken positions on the issue, thereby widening the split among the circuits. *See Vazquez v. Ragonese*, 2005 WL 1842273, at *1; *Jones Bey*, 407 F.3d at 806. Second, the *Ortiz* petitioners had repeatedly conceded in the proceedings below that, on the facts of that case, application of the

(continued...)

expressly rejected the Tenth Circuit's decision in *Ross*, concluding that the factors discussed by the Tenth Circuit weighed in favor of a partial – rather than a total – exhaustion rule. *See id.* at 656-63. In particular, the Second Circuit found significant that non-exhaustion is not listed among the grounds on which a district court may dismiss a PLRA plaintiff's "action" or "claims" under § 1997e(c). *See id.* at 657. The Second Circuit also reasoned that, contrary to *Ross*'s analysis, a total exhaustion rule would invite piecemeal litigation, thereby increasing the number of PLRA suits and frustrating Congress' stated intent to reduce such suits. *See id.* at 658-59. Finally, the Second Circuit found that *Ross*'s "heavy reliance on * * * habeas 'total exhaustion' principles [wa]s misplaced" because prison grievance systems are distinct in a number of significant ways from state courts adjudicating criminal appeals and collateral attacks on an underlying conviction. *Id.* at 660-62.

The Seventh Circuit has not addressed the total exhaustion issue directly but has practiced partial exhaustion by dismissing only unexhausted claims when a mixed complaint has been filed. *See Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003) (affirming dismissal of one claim

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[18](...continued)
total exhaustion rule was unnecessary. *See Ortiz* BIO at 8.

Finally, the *Ortiz* petition sought interlocutory review of the Second Circuit's decision dismissing the respondent's one unexhausted claim and allowing his remaining exhausted claim to go forward. *See Ortiz*, 380 F.3d at 656, 663; *see also Ortiz* BIO at 7. Accordingly, by the time the case came before this Court at the certiorari stage, the petitioner's complaint was "no longer a 'mixed complaint,'" and the petitioner's unexhausted claim was "out of the case and incapable of being reinstated." This interlocutory posture made *Ortiz* an imperfect vehicle – in stark contrast to the instant petition – for this Court's review. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); *see also* Stern et al., *supra*, § 4.18, at 258 n.59 (noting that this Court routinely denies petitions challenging interlocutory determinations that have been mooted or may be mooted by the conclusion of the lower courts' proceedings).

for failure to exhaust but remanding for determination of whether other claim was exhausted); *Dixon v. Page*, 291 F.3d 485, 489-90 (CA7 2002) (affirming partial dismissal for failure to exhaust); *see also Henderson v. Sebastian*, No. 04-C-0039-C, 2004 WL 1946398, *5 (W.D. Wis. Aug. 25, 2004) ("I view the [Seventh Circuit's] tacit rejection of a total exhaustion requirement in § 1983 actions as consistent with the Second Circuit's holding [in *Ortiz*]. I believe that partial dismissal is the proper course to take addressing a suit containing both exhausted and unexhausted claims."). The Fifth Circuit has also practiced partial exhaustion by dismissing only unexhausted claims from a mixed PLRA complaint. *See Johnson*, 385 F.3d at 533.

In the three circuits in which the issue has been addressed at only the district court level – the First, Fourth, and Ninth Circuits – the district courts' decisions reveal similar divisions. The District of Maine, to our knowledge the only district court within the First Circuit to confront the issue, has embraced the total exhaustion rule. *See Donovan v. Magnusson*, No. Civ. 03-226-B-W, 2004 WL 1572598, *2 (D. Me. June 7, 2004). The only two district courts within the Fourth Circuit, to our knowledge, that have confronted the issue are split. *Compare Johnson v. True*, 125 F. Supp. 2d 186, 188 (W.D. Va. 2000) (rejecting total exhaustion rule), *with Cummings v. Rubenstein*, No. Civ. A. 5:03-2195, 2004 WL 3312062, *9 (S.D.W. Va. Sep. 30, 2004) (embracing total exhaustion rule). Finally, the dozens of district courts within the Ninth Circuit that have confronted the issue are similarly split. *Compare, e.g., Ramirez v. Bray*, No. C 04-3769 MMC (PR), 2005 WL 2249900, *1-*2 (N.D. Cal. Sep. 15, 2005) (applying "total exhaustion" rule); *Smith v. Villanueva*, No. CV04-1211-MO, 2005 WL 2105013, *1 (D. Or. Aug. 22, 2005) (same); *Ornelas v. Giurbino*, 358 F. Supp. 2d 955, 962 (S.D. Cal. 2005) (same); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258, 1263 (D. Haw. 2000) (same), *with Singleton v. Morales*, No. CV F 035557RECLJOP, 2005 WL 2064145, *3 (E.D. Cal. Aug. 25, 2005) (rejecting "total

exhaustion" rule); *Clark v. Mason*, No. C04-1647C, 2005 WL 1189577, *9 (W.D. Wash. May 19, 2005) (same); *Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1179 (D. Nev. 2004) (same); *Lozeau v. Lake County, Montana*, 98 F. Supp. 2d 1157, 1167 (D. Mont. 2000) (same); *Cooper v. Garcia*, 55 F. Supp. 2d 1090, 1095 (S.D. Cal. 1999) (same).

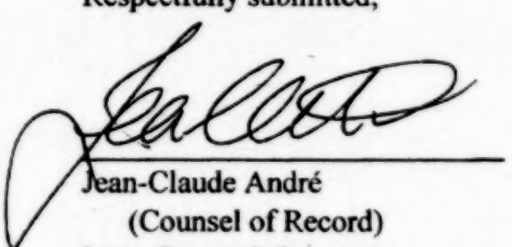
It is clear that, if this case was decided in a circuit without a total exhaustion rule, petitioners' exhausted claims would go forward. A PLRA plaintiff's ability to test the merits of his exhausted claims should not turn on such geographic whims. Without a definitive ruling from this Court, the PLRA's exhaustion requirement will continue to be applied inconsistently in the courts across the country..

Because these circuit splits will not go away absent this Court's intervention, because these issues affect hundreds – if not thousands of prisoner civil rights suits each year – and because the Sixth Circuit's decision in this case is plainly wrong, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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